

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BOMBARDIER INC.,
Plaintiff,

v.

MITSUBISHI AIRCRAFT
CORPORATION, MITSUBISHI
AIRCRAFT CORPORATION AMERICA,
INC., et al.,
Defendants.

No. 2:18-cv-1543 JLR

DEFENDANT MITSUBISHI AIRCRAFT
CORPORATION AMERICA, INC.'S REPLY
IN SUPPORT OF ITS MOTION TO
DISMISS FIRST AMENDED COMPLAINT
WITH PREJUDICE

NOTE ON MOTION CALENDAR:

June 7, 2019

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

This Court previously dismissed the claims against MITAC America because Bombardier failed to allege facts showing MITAC America’s knowledge of supposed misappropriation. (Dkt. 136 at 19 (“Bombardier’s failure to identify any MITAC America employee or executive who took or viewed a trade secret is crucial.”).) In its Motion, MITAC America explained why— notwithstanding a three-prong attempt by Bombardier to fill the gap—the defect was not cured.

Instead of substantively addressing the deficiencies that remain in the First Amended Complaint (“FAC”), Bombardier makes a series of misguided legal arguments that collectively demonstrate the futility of the argument it advances. For example, Bombardier relies on an erroneous pleading standard—that a “claim based on speculation” and implausible factual allegations survives a motion to dismiss—and re-raises arguments the Court has already rejected. Bombardier also contends that MITAC America defeated its own motion by accepting as true the new factual allegations, which is of course a requirement at this stage, not fatal “admissions” as argued by Bombardier. It goes so far as to twice criticize MITAC America for not “rebutting” Bombardier’s allegations, an untenable position given that MITAC America is precluded from doing so in a Rule 12(b)(6) motion. In the end, Bombardier asks for discovery to try and support its theory that MITAC America is an alter ego of MITAC—and thus its corporate structure should be ignored so it can answer for MITAC’s alleged wrongdoing—while ignoring that MITAC itself is a Defendant here ready and able to respond to Bombardier’s accusations.

In sum, the paucity of factual allegations in the FAC relating to MITAC America’s own conduct, and the myriad of unsuccessful legal arguments Bombardier uses to try and impute to MITAC America the alleged knowledge of other companies and their employees, demonstrates the futility of Bombardier’s efforts to state a plausible claim against MITAC America.

The claims in the FAC against MITAC America should be dismissed with prejudice.

II. ARGUMENT

A. Bombardier did not address the “crucial” missing fact.

In dismissing Bombardier’s claims against MITAC America, the Court held that “Bombardier fails to allege that MITAC America knew or had reason to know that it improperly acquired or used Bombardier’s trade secrets.” (Dkt. 136 at 19.) Specifically, the “crucial” shortcoming was “Bombardier’s failure to identify any MITAC America employee or executive who took or viewed a trade secret.” (*Id.*)

The same “crucial” gap remains. Neither the FAC nor Bombardier’s Response identifies a single MITAC America employee who took or viewed an identified trade secret. Instead, Bombardier tries to sidestep the Court’s guidance by basing its claim on *others’* alleged conduct and on the mere recruitment of qualified employees.

1. Bombardier relies on lawful recruiting and other parties’ conduct.

The Court explained that recruiting Bombardier employees does not clear the “knowledge” hurdle. (Dkt. 136 at 19); *see also Joshua David Mellberg LLC v. Will*, 96 F. Supp. 3d 953, 981-82 (D. Ariz. 2015). Yet, in its FAC, Bombardier still does not identify anything that MITAC America allegedly did beyond recruiting employees. Bombardier only points at other Defendants. For example, Bombardier (at 3) summarizes its new allegations as follows: (a) Korwin-Szymanowski [*not a MITAC America employee*] recruited and allegedly supervised former Bombardier employees; (b) Bombardier attorneys communicated about the recruitment with a different company, Mitsubishi Heavy Industries [*not MITAC America*]; (c) MITAC [*not MITAC America*] had corporate knowledge of misappropriation; and (d) unnamed “MITAC America employees *recruited* from Bombardier” would have recognized Bombardier secrets [an argument already specifically rejected by the Court, (*compare* Dkt. 229 at 3 (citing FAC ¶129) *with* Dkt. 136 at 22)]. This reliance is fatal. (*See* Dkt. 136 at 37.)

Bombardier plays semantics by arguing that it does not base its claims on “‘poaching’ of Bombardier employees,” but instead “that it is Defendants’ pursuit of Bombardier’s trade secret

1 information through targeted *recruitment of Bombardier's certification personnel* that gives rise
 2 to Bombardier's claims." (Dkt. 229 at 16-17 (emphasis added).) This is a distinction without a
 3 difference. However phrased, the Court already held that, without more, recruiting another
 4 company's employees falls short of the knowledge requirement for trade secret misappropriation.

5 2. MITAC America's acceptance as true factual allegations in the FAC are not
 6 "admissions."

7 Bombardier also cannot change the "crucial" issue before the Court by making the Motion
 8 about MITAC America's "admissions." MITAC America did not admit anything; rather, it
 9 accepted as true non-conclusory factual allegations in the FAC and accurately identified
 10 Bombardier's multiple attempts to cure the deficiencies in the original Complaint before
 11 explaining why those attempts fail. Nothing more. Similarly, Bombardier (at 7) criticizes MITAC
 12 America for not offering evidence "to rebut [its] allegations." While in its preliminary injunction
 13 briefing, MITAC America submitted voluminous evidence that it did nothing wrong, for purposes
 14 of this Rule 12(b)(6) Motion, such rebuttals would be inappropriate.

15 **B. Bombardier misapprehends the standard, believing erroneously that a speculative**
 16 **claim based on implausible factual allegations can survive a motion to dismiss.**

17 Bombardier (at 6) claims it can "assert a claim based on speculation" and survive a motion
 18 to dismiss, relying on the holding in *United States ex rel. Vatan v. QTC Med. Servs., Inc.*, 721 F.
 19 App'x 662, 664 (9th Cir. 2018). However, Bombardier entirely misreads and misapprehends the
 20 *Vatan* decision. The Ninth Circuit in *Vatan* did not hold or even suggest that a plaintiff can assert
 21 a claim based on speculation. Instead, the *Vatan* Court was discussing a *district court's*
 22 *speculation*, ruling that a district court's speculation that a defendant might have a strong defense
 23 does not prevent the plaintiff from stating a plausible claim. Further, Bombardier's misreading of
 24 *Vatan* is all the more significant given that the correct standard is the opposite of what
 25 Bombardier understands it to be: "a claim based on speculation is insufficient to survive a pre-
 26 discovery motion to dismiss." *IOSTAR Corp. v. Stuart*, No. 1:07-cv-133, 2009 WL 270037, at *6
 (D. Utah Feb. 3, 2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Bombardier (at 10) compounds its mistake further, arguing that only *claims* must be plausible. According to Bombardier, *all* factual allegations in a complaint—even implausible ones—must be taken as true by the Court so long as they are not formulaic recitations or naked assertions. (Dkt. 229 at 10:11-15.) But the law is to the contrary, as the Ninth Circuit explains: “it is within our wheelhouse to reject, as implausible, allegations that are too speculative to warrant further factual development.” *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076 (9th Cir. 2013); *see also Block v. Snohomish Cty.*, No. C14-235RAJ, 2015 WL 4164821, at *4 (W.D. Wash. July 8, 2015), *aff’d*, 733 F. App’x 884 (9th Cir. 2018) (same). That implausible allegations are to be given no credence is not only consistent with the law but also with common sense. Using an absurd example, under the pleading standard urged by Bombardier, it could cure the deficiency in its claims by alleging that aliens came down and whispered the requisite knowledge to MITAC America. It should go without saying that implausible allegations are to be disregarded.

Likewise, Bombardier’s emphatic reliance on the statutory language, “reason to know” that a trade secret at issue was improperly acquired (at 14-15), is also misplaced. That language does not impact the standard to apply, the proper analysis, or the result here. MITAC America recognized “reason to know” as one way to show the requisite knowledge. (*See* Dkt. 180 at 1, 17.) But as discussed in the Motion and below, no factual allegations support a conclusion that anyone at MITAC America had reason to know that any trade secret at issue here was acquired or used.¹

¹ Bombardier relies heavily on an unpublished case from another district, *Select Timber Prod. LLC v. Resch*, No. 3:17-cv-00541, 2017 WL 3709066 (D. Or. Aug. 27, 2017), but that case was inapposite. *Select Timber* nowhere holds that “reason to know” are magic words that relieve a defendant of its duty to plead plausible facts. In fact, this District has rejected speculation about what a defendant “knew or should have known” where the complaint “provides no factual basis to support his contention.” *McGary v. Cunningham*, No. C13-5130 RBL-JRC, 2013 WL 5913434, at *4 (W.D. Wash. Nov. 1, 2013); *see also* Authority in Dkt. 180 at 8.

Bombardier omits from its description of *Select Timber* that the design and operation of the machine was a “key element” of the alleged secrets, a person with knowledge of the secret communicated with the corporate defendant and its CEO (not another party, as is the case here) about the machine, and the defendant paid \$10,000 to learn the secret process. Those facts are not present here, as Bombardier continues to base its case against MITAC America solely on other parties’ conduct or its legal recruitment of employees. Further, procedurally, the court in *Select Timber* had already granted the plaintiff a TRO, and thus was familiar with the underlying facts and evidence supporting the claim, making it unlikely the court would thereafter reverse course by granting motion to dismiss.

C. Bombardier failed to cure the deficiency with its trade secret claims.

The MHI letters do not help Bombardier: Bombardier's continued reliance on the MHI letters (Dkts. 143-5, 143-8, 143-9) remains misplaced because they do not identify any documents allegedly stolen, nor any other specific trade secret.² The letters (attached to the FAC and thus properly considered) merely refer to unspecified "know-how," "trade secrets," "expertise," and "intellectual property" possessed by its employees. This Court explained that, with respect to the comparable no-poach letters to AeroTEC, "none of Bombardier's alleged requests to stop recruitment identified a specific trade secret" and so the letters did not plausibly impute the requisite knowledge. (Dkt. 136 at 31.) The MHI letters are less specific than those to AeroTEC and therefore are similarly unable to impute the requisite knowledge. (*Compare* MHI letters with Dkt. 1-12 at 6 (stating "confidential information" improperly used includes "employee identities, abilities, preferences and compensation"), 7-8 (listing specific former employees).)

Ignoring the Court's ruling on the AeroTEC letters, Bombardier insists (at 16) that the MHI letters satisfy the knowledge requirement, claiming that MITAC America's argument—and thus implicitly the Court's ruling on the AeroTEC letters—"makes no sense." To the contrary, it makes perfect sense as both the federal and Washington statutes define requisite knowledge with respect to "*the* trade secret" at issue. 18 U.S.C. § 1839(5); RCW 19.108.010(2) (emphasis added). Since the MHI letters make no distinction between the general skills and experience of Bombardier's former employees (over which it has no rightful claim) and its allegedly proprietary information, much less identify "the" trade secret at issue (*e.g.*, a purportedly stolen document), the letters cannot impute requisite knowledge of the misappropriation to MITAC America.

Further, Bombardier's insistence that its allegations that recruiting employees who worked with its trade secrets is sufficient to state a claim misses the mark. First, the MHI letters simply demand that all recruitment of Bombardier employees cease. Bombardier admits (at 16) that the

² As cited in Bombardier's Response (at 3) and shown in the FAC redline (Dkt. 181), the only paragraphs in the FAC with new content related to the letters are 60, 65, and 66. Those paragraphs cite only the three documents listed, which we refer to as the MHI letters, even though the last is addressed to MITAC.

1 letters say only that former employees “could be” in possession of unidentified trade secrets,
 2 which “could in turn” result in wrongful use. But that is potentially true every time a company
 3 recruits a competitor’s employees. Thus, Bombardier is effectively arguing that recruiting
 4 employees who worked with trade secrets is always enough to plead knowledge. This argument
 5 has already been rejected by the Court (Dkt. 136 at 19), and Bombardier provides no basis to
 6 revisit the issue. Further, if Bombardier’s position was correct, no trade secret case involving
 7 employee recruitment from competitors could ever be dismissed for lack of knowledge.

8 Relying on Korwin-Szymanowski does not help Bombardier: No agency. Bombardier (at
 9 7-9) all but concedes that no factual allegations in the FAC suggest that MITAC America
 10 controlled Korwin-Szymanowski or consented to an agency relationship—which Bombardier
 11 simultaneously admits are essential elements to plausibly show agency. Instead, the facts
 12 Bombardier relies on to argue that he was MITAC America’s agent are: (a) he works for
 13 AeroTEC, (b) MITAC America hired AeroTEC to work on the MRJ project, and (c) he recruited
 14 persons to work for AeroTEC on the MRJ project at the MITAC America flight center. Those
 15 facts do not plausibly allege the requisite control for an agent because they do not show that
 16 MITAC America controlled the “manner of [his] performance” in any way. *See Barker v. Skagit*
 17 *Speedway, Inc.*, 119 Wn. App. 807, 814 (2003). Further, nothing about recruiting for his
 18 employer—AeroTEC—plausibly suggests that he consented to serve as an agent to the third party
 19 that contracted with his employer for a project, or vice versa.

20 With no facts to point to, Bombardier (at 9) waves its hands at implied agency, hoping that
 21 might be a lower hurdle. Implied agency exists when the “parties’ actions, conduct and words”
 22 establishes “implied[] consent that one shall act under the control of the other.” *Optimer Int’l, Inc.*
 23 *v. Bellevue, L.L.C.*, 134 Wn. App. 1027 (2006) (finding no agency). But Bombardier proffers no
 24 facts or analysis to show how implied agency might be implicated here. The allegations relied on
 25 suggest only that Korwin-Szymanowski was working at the behest his employer, AeroTEC.
 26 Bombardier cites no action, conduct, or statement by Korwin-Szymanowski that would suggest he

1 was MITAC America's agent by implication.

2 Finally, Bombardier's complaint (at 8-9) that information about whether Korwin-
 3 Szymanowski was MITAC America's agent is exclusively in control of the Defendants is without
 4 merit.³ First, Bombardier was able to state a claim against AeroTEC and MITAC. Second, it is
 5 clear from the FAC and the letters sent to AeroTEC and MHI that Bombardier had access to a
 6 plethora of information about Korwin-Szymanowski's actions, conduct and words.

7 *No knowledge.* The Court held that Bombardier failed to plausibly allege Korwin-
 8 Szymanowski's knowledge in the original Complaint. (Dkt. 136 at 29-30.) Bombardier attempts
 9 to cure that deficiency in the FAC, but with a problematic set of general, conclusory allegations
 10 made "on information and belief": that he supervised other AeroTEC defendants who allegedly
 11 stole documents, reviewed their work, which somehow "incorporated" unidentified Bombardier
 12 secrets, and he would have for some reason recognized the (unidentified) incorporated secrets.
 13 (Dkt. 143 ¶ 274.)⁴ He is not alleged to have ever seen any of the allegedly stolen documents. As
 14 MITAC America pointed out, Bombardier provided no factual support for these vague and
 15 speculative conclusions (Dkt. 180 at 3, n.3), and Bombardier did not identify any in its Response
 16 (Dkt. 229 at 9-10).

17 *No knowledge while an alleged agent.* Further, an agent's knowledge is not imputed to a
 18 principal when it was "acquired outside the scope of his powers or duties, or when he is not acting
 19 for or on behalf of the corporation." *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn.
 20 App. 229, 268–69 (2009). Bombardier argues an agency relationship based on Korwin-

21 ³ The fact that information may be in a defendant's possession is not a get-out-of-motion-to-dismiss-free
 22 card. Rather, Bombardier must still allege facts to "establish any basis for [its] belief" that he was a MITAC America
 23 agent. *See B.R. v. Beacon Health Options*, No. 16-cv-04576, 2017 WL 5665667, at *5 (N.D. Cal. Nov. 27, 2017).
 24 Otherwise, for example, Bombardier could sue every past Bombardier employee who had knowledge of its trade
 25 secrets, and who has since worked on the MRJ, and claim they misappropriated trade secrets and are a MITAC agent,
 26 and it could do so with impunity by claiming that knowledge of agency and misappropriated secrets is uniquely
 within the defendants' possession.

⁴ MITAC America is not arguing that "information and belief" allegations are *per se* inappropriate, and its
 Motion does not rise or fall with the general viability of such allegations. Rather, Bombardier (at 8) admits here that it
 "relied on" Korwin-Szymanowski's declaration to formulate its "information and belief" allegations, yet Bombardier
 inexplicably makes allegations directly contrary to his sworn testimony.

1 Szymanowski's recruitment efforts. (Dkt. 143 ¶ 128.) But his newly pleaded supposed *knowledge*
 2 about supposed misappropriation was allegedly acquired while working as an AeroTEC manager,
 3 supervising AeroTEC employees who were working for AeroTEC. (*See id.* ¶ 274.) The FAC
 4 includes no allegations that MITAC America controlled the manner in which Korwin-
 5 Szymanowski supervised AeroTEC employees. So no plausible inference can be drawn that he
 6 was a MITAC America agent for the purpose of supervising his AeroTEC team. *See Barker*, 119
 7 Wn. App. at 814. Thus, even assuming he was a MITAC America agent for recruiting, the
 8 knowledge he may have gained while supervising AeroTEC employees cannot be imputed to
 9 MITAC America.

10 An alter ego theory is doomed, and no discovery is warranted: Bombardier *argues* it
 11 alleged sufficient alter ego facts (at 10-11) but cites no law to support that conclusion. And
 12 applying applicable law shows that Bombardier's allegations fall far short. According to the Ninth
 13 Circuit in a case on which Bombardier relies heavily for *other* propositions, "[t]o satisfy the alter
 14 ego test, a plaintiff must make out a prima facie case (1) that there is such unity of interest and
 15 ownership that the separate personalities of the two entities no longer exist and (2) that failure to
 16 disregard their separate identities would result in fraud or injustice." *Ranza v. Nike, Inc.*, 793 F.3d
 17 1059, 1073 (9th Cir. 2015) (citations omitted).⁵ A "unity of interest and ownership" requires
 18 "showing that the parent controls the subsidiary to such a degree as to render the latter the mere
 19 instrumentality of the former" by "dictat[ing] every facet of the subsidiary's business — from
 20 broad policy decisions to routine matters of day-to-day operation." *Id.* (citations omitted). A
 21 parent's total ownership and sharing management personnel are alone insufficient. *Id.*

22 Bombardier's allegations here reflect only a normal parent-subsidiary relationship; they
 23 nowhere near approach the unmitigated control necessary to meet the first element. *See, e.g., id.* at
 24 1074 (holding no alter ego where: "Nike is heavily involved in [subsidiary] NEON's operations.

25 ⁵ Bombardier (at 18-20) discusses at length from *Ranza* to argue alter liability *can* be imputed from a parent
 26 to a subsidiary. Notably, however, Bombardier then ignores entirely the notoriously high bar *Ranza* sets for what is
 required to plead when liability *should* be imputed to a subsidiary.

1 Nike exercises control over NEON’s overall budget and has approval authority for large
 2 purchases; establishes general human resource policies for both entities and is involved in some
 3 hiring decisions; operates information tracking systems all of its subsidiaries utilize; ensures the
 4 Nike brand is marketed consistently throughout the world; and requires some NEON employees
 5 to report to Nike supervisors on a ‘dotted-line’ basis.”); *Doe v. Unocal Corp.*, 248 F.3d 915, 927
 6 (9th Cir. 2001) (abrogated on other grounds) (finding that extensive parent involvement with
 7 subsidiaries (including control over subsidiaries’ acquisitions, divestments and capital
 8 expenditures; formulation of general business policies and strategies; providing financing; and
 9 overlapping directors) insufficient); *see also Payoda, Inc. v. Photon Infotech, Inc.*, 2015 WL
 10 4593911, at *3 (C.D. Cal. July 30, 2015); *Sia v. AirAsia Berhad*, 2017 WL 1408172, at *5, n.3
 11 (W.D. Wash. April 20, 2017).

12 Further, Bombardier has not and cannot plausibly plead the second element, that
 13 respecting MITAC and MITAC America’s separate corporate structures would sanction a fraud or
 14 promote injustice. *Ranza*, 793 F.3d at 1073. “The injustice that allows a corporate veil to be
 15 pierced is not a general notion of injustice; rather, it is the injustice that results only when
 16 corporate separateness is illusory.” *Katzir’s Floor & Home Design, Inc. v. M--MLS.com*, 394 F.3d
 17 1143, 1149 (9th Cir. 2004); *Firstmark Capital Corp. v. Hempel Fin. Corp.*, 859 F.2d 92, 94 (9th
 18 Cir. 1988) (“[T]he ‘kind of inequitable result’ that makes alter ego liability appropriate is abuse of
 19 the corporate form, such as under-capitalization or misrepresentation of the corporate form to
 20 creditors.”). Bombardier’s conclusory arguments that unless the corporate veil is pierced here
 21 other companies would “suffer the same fate as Bombardier” (Dkt. 143 ¶ 95) or other former
 22 employees could “transmit Bombardier trade secrets to MITAC with impunity” (*Id.* ¶ 94) strains
 23 credulity. Notably, such speculative harm also does not logically follow from respecting the
 24 corporate form here. And Bombardier provides no explanation. Simply put, injustice cannot lie
 25 where Bombardier has a remedy for alleged MITAC misconduct: its claim *against MITAC*.

26 *Discovery is unwarranted.* The purpose of the pleading standards is to “protect defendants

from being ‘subjected to the expense of discovery and continued litigation’ absent ‘factual allegations that . . . plausibly suggest an entitlement to relief.’” *Ranza v. Nike Mountain Club Owner’s Ass’n v. Graybar Elec. Co.*, 2014 WL 130767, at *2 (E.D. Cal. Jan. 14, 2014) (omission in original) (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). “[D]iscovery cannot be used as a fishing expedition for evidence of claims that have not been properly pled.” *Torio v. Wells Fargo Bank, N.A.*, 2016 WL 2344243, at *5 (N.D. Cal. May 4, 2016).⁶ Given the posture of this case, no discovery on Bombardier’s farfetched alter ego theory is warranted. Bombardier advised the Court that it needed no discovery to respond to the motion to dismiss.⁷ Further, as just explained, it would be futile as Bombardier has a remedy against MITAC for its alleged wrongdoing and an alter ego theory is unavailing.⁸ Bombardier should not be permitted to burden MITAC America with discovery to no end.

D. Bombardier fails to cure the deficiency with its tortious interference claim.

1. Bombardier admits its claim is solely premised on recruiting from a competitor.

Bombardier explains (at 12-13) that its theory is based on a “*general* business expectancy” that it would “*generally* adhere” to its schedules. In other words, Bombardier—like every business—generally expects to complete its projects on time. Bombardier (at 4) identifies the wrongful conduct underlying its tortious interference claim: MITAC America recruited Bombardier personnel even after it demanded that the recruitment stop. But, no tortious interference claim can be predicated on these facts, as this Court recognized. (Dkt. 136 at 37.)

⁶ “Although the Ninth Circuit has, at times, allowed discovery into the relationship between a parent and subsidiary, it has done so when there are sufficient factual allegations to support finding an agency relationship.” *Nev. Power Co. v. Trench France SAS*, 2015 WL 6737015, at *4 (D. Nev. Nov. 2, 2015), (denying request for discovery); see also *Pfister v. Selling Source, LLC*, 931 F. Supp. 2d 1109, 1118 (D. Nev. 2013) (observing that the Ninth Circuit has sometimes allowed discovery “when there is some evidence before it that the corporate formalities have not been maintained”). Here, Bombardier has not offered “sufficient factual allegations to support finding an agency relationship” or that “corporate formalities have not been maintained.”

⁷ Bombardier also agreed discovery would be premature until after it identified with specificity all trade secrets at issue in this litigation, which it has not done or offered to do. (See, e.g., Dkt. 47 at 7.)

⁸ *Fin. Express LLC v. Nowcom Corp.*, 2008 WL 11342755 (C.D. Cal. Mar. 6, 2008) and *Windisch v. Hometown Health Plan, Inc.*, 2010 WL 786518 (D. Nev. Mar. 5, 2010), cited by Bombardier, did not grant limited discovery; both courts found alter ego liability sufficiently alleged. *Fin. Express*, at *3; *Windisch*, at *8.

1 Nonetheless, Bombardier argues (at 12) that its allegations are sufficient because no cases
 2 suggest that “informing a defendant of a business expectancy, the problematic conduct that is
 3 interfering with that expectancy, and the resulting consequential harm is insufficient to maintain”
 4 a tortious interference claim. Bombardier misses the mark: the lack of cases rejecting a claim on
 5 such facts is not relevant. Rather, the relevant issue is whether any cases support a tortious
 6 interference claim based on such facts. Bombardier cites none.

7 A short hypothetical illustrates the fallacy of Bombardier’s position, and explains why
 8 Bombardier is unable to cite authority for its position: Acme Company has a general business
 9 expectancy that it will sell 100 widgets per quarter; Acme’s competitor begins selling widgets at a
 10 lower price, so Acme sends a letter informing the competitor of Acme’s business expectancy and
 11 that the problematic conduct—selling cheaper widgets—is going to interfere with Acme’s
 12 quarterly sales expectancy. The competitor refuses to raise its prices, and when Acme does not
 13 sell its 100 widgets that quarter, it sues the competitor for tortious interference. Applying
 14 Bombardier’s reasoning, Acme can state a plausible interference claim.

15 But that is not the law. To constitute a tort, the relevant interference *must be for an*
 16 *improper purpose*, which means it must be “wrongful by some measure *beyond the interference*
 17 *itself*, such as a statute, regulation, recognized rule of common law, or an established standard of
 18 trade or profession.” *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc.*, 52 P.3d
 19 30, 34 (Wash. Ct. App. 2002) (emphasis added); *see also Nat’l City Bank, N.A. v. Prime Lending,*
 20 *Inc.*, No. CV-10-034-EFS, 2010 WL 2854247, at *1, *5 (E.D. Wash. July 19, 2010 (dismissing
 21 tortious interference where a competitor “effectively shut down” the plaintiff by causing a “mass
 22 resignation” of employees). Just as Acme’s competitor selling cheaper widgets is not wrongful,
 23 MITAC America’s recruiting qualified, at-will employees is not wrongful. Thus, the claim fails.

24 2. Bombardier left the causation deficiency with the original Complaint uncured.

25 The Court dismissed Bombardier’s tortious interference claim premised on its certification
 26 schedules because “Bombardier fails to plausibly allege that MITAC America induced or caused

1 a breach of Bombardier’s certification schedules.” (Dkt. 136 at 38.) Bombardier still does not
 2 plausibly plead that any conduct by MITAC America caused it harm. Rather, Bombardier only
 3 complains of MITAC America’s recruiting efforts. And Bombardier (at 22) concedes that its
 4 “harm” of a vague delay of at least several months was caused “not [by] the loss of employees to
 5 MITAC America specifically,” but rather “is the loss of critical certification employees, period.”
 6 Thus, Bombardier essentially tries to state a claim by imputing to MITAC America the alleged
 7 harm (delay) caused by other companies (AeroTEC and MITAC) having hired its critical
 8 certification employees. Bombardier’s admission that it has not pled that MITAC America hired
 9 any critical certification employee from Bombardier defeats its effort to plead causation.

10 3. Bombardier did not sufficiently allege MITAC America’s knowledge or intent.

11 Bombardier (at 12-13) tries to expand the purported business expectancy it pleaded to one
 12 that extends beyond the specifics of the certification schedules. In doing so, Bombardier defeats
 13 itself because its new “general” business expectancy is insufficient to establish a plausible claim
 14 for tortious interference. (*See* Dkt. 180 at 21); *Diederich v. Providence Health & Servs.*, 622 F.
 15 App’x 613, 615 (9th Cir. 2015) (plaintiff failed to establish business expectancy where “Diederich
 16 does not show that he had any *specific* business expectancy post-residency”) (emphasis added).

17 Bombardier was further required to plausibly plead intent: that MITAC America “knew”
 18 or was “substantially certain” that its actions would cause Bombardier’s schedules to be delayed.
 19 (*See* Dkt. 180 at 22.) Bombardier did not respond to MITAC America’s argument that one could
 20 not plausibly infer such knowledge from the FAC in light of (a) Bombardier’s highly publicized
 21 mass layoffs, and (b) the lack of any allegations that MITAC America knew which employees
 22 were critical to Bombardier’s certification schedule, or that MITAC America targeted only such
 23 key personnel and hired them. (*See id.* at 22-23.) The lack of a response speaks volumes.

24 **III. CONCLUSION**

25 For the reasons stated here and in its Motion, MITAC America respectfully requests the
 26 Court dismiss Counts III, IV, and VIII of the FAC *with prejudice*.

1
2 RESPECTFULLY SUBMITTED this 7th day of June 2019.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on June 7, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses indicated on the Court's Electronic Mail Notice List.

DATED this 7th day of June 2019.

s/ Mary Z. Gaston

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